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CHAPTER FOUR

Types of Water Transfers and Petitioning for a Transfer

A water transfer is a change in the way water is usually allocated among users and includes a change in the purpose and place of use of the water. A transfer cannot injure other legal water right holders. Most water transfers (i.e., agriculture to agriculture, agriculture to urban) do not require approval of the SWRCB because they are short-term transfers. A transfer of water to an environmental use does require the approval of the SWRCB, however, and Water Code section 1707 allows a party to dedicate—on a short-term, long-term, or permanent basis—water for environmental use within the context of a water transfer.

Once a right has been acquired, the new holder of that right must file a petition with the SWRCB's Division of Water Rights, as described below, to transfer the right and to change the purpose of use from its current use to its environmental use. This can include the preservation or enhancement of wetlands, fish, and wildlife resources, or for purposes of recreation in or on the water.¹ This is referred to as “dedicating the right.” The petition must specify the time, location, the scope of the requested change, and any other relevant information.² For example, in the case of enhancing instream flows, the

petitioner must supply an exact description of the place of use (where the acquired water will be used for instream flow purposes), whether the instream use will end at a certain location in the stream and be diverted for some other use, or any other details regarding the way the water will be used.

The transfer and protection of a water right to preserve and enhance the environment is called "dedicating the right."

In cases where the conveyance and delivery of the transferred water require use of infrastructure associated with state or federal water projects, BOR or DWR will review the application.

In evaluating the petition, the SWRCB must determine that the proposed change will not (1) exceed the amount of water the petitioner is entitled to use or (2) unreasonably affect any current legal user of the water. The SWRCB will also assure that the petition meets the requirements of California water law.³

TYPES OF WATER TRANSFERS



The Water Code recognizes two types of transfers: short-term transfers and long-term transfers. Short-term transfers cannot exceed one year, whereas long-term transfers are for any period in excess of one year.⁴ The following is a description of the general procedures for seeking SWRCB's approval for short- and long-term transfers and the specifics of the petitioning and approval process.

Short-Term Water Transfers

A petition for a short-term transfer receives highest priority attention from the SWRCB. In fact, the California Water Code (see Appendix C, "Excerpts from the California Water Code") provides for expedited review of short-term or temporary transfers of post-1914 appropriative water rights as a way of improving the administrative system's ability to meet needs.⁵ To expedite these reviews, the Water Code states that short-term transfers are not subject to the requirements of the California Environmental Quality Act (CEQA), which can be a lengthy process and result in other environmental issues and requirements coming to the fore.⁶ (Refer to Appendix D for excerpts from the California Code of Regulations.)

A short-term transfer can involve water that otherwise would be consumptively used or stored. The transfer can involve a change in the point where a diversion occurs, the place where the water is used, or the purpose for which it will be used, but only for a period of one year or less. The transfer may not injure any legal user of the water or unreasonably affect fish, wildlife, or other instream beneficial uses.⁷

Within ten days of receiving a petition for a short-term transfer, the SWRCB must initiate an investigation of the proposed temporary change.⁸ During the same time period, the petitioner must give public notice to any water right holders of record who may be affected by the proposed change.⁹

Finally, in submitting a petition for a short-term transfer, the petitioner must establish, to the SWRCB's satisfaction, that the temporary change would neither injure any legal user of water during any potential hydrologic condition (i.e., the interrelationship among surface and groundwater as well as flow, quantity, and timing of water affected by physical and biological factors), nor unreasonably affect fish, wildlife, or other instream beneficial uses.¹⁰

Within 30 days after the petitioner gives public notice of the proposed change, water users and other interested parties may submit written comments on the proposal to the SWRCB.¹¹

Generally, the SWRCB must render a written decision within 35 days of initiating its investigation or within 35 days after the petitioner publishes the public notice of change.¹² The SWRCB may extend this time by 20 days for good cause, or if the SWRCB receives timely written comments on the proposed transfer.¹³ The SWRCB also may extend the time for the investigation, with the petitioner's consent, if the board determines that it needs to conduct a hearing before it can render a decision on the transfer.¹⁴

To avoid downstream water users diverting environmental water, you can obtain a written agreement from them in advance, or you can limit the use of instream flows to areas without this risk.

One way to avoid the problem of downstream water users diverting water dedicated to an environmental purpose is to notify them in advance of the transfer and obtain from them a written agreement stating they will not infringe on the new water. Another method is simply to limit the use of new instream flows to areas where this risk is minimal.





DOWNSTREAM WATER USER SCENARIOS

With all types of transfers, there is a real possibility that downstream water users may try to divert newly acquired instream flow for their own use. This is a monitoring and enforcement concern and should not prevent the SWRCB from approving a change petition. But you should be aware of a potential threat to the dedicated water right and be ready to address the issue should it arise. If downstream water users possess water rights that are senior to your newly acquired right, then a review of their historic water usage may be in order to determine if they have historically diverted their entire allocation. The burden of monitoring is borne by the agency managing the environmental water: in cases where the actual quantity of environmental water is small, this becomes difficult.

If a downstream user has received his entire allotment, then he would not have the right to divert additional water from increased instream flows. If he has not diverted his entire water right, then his right might be reduced through non-use (depending on the type of right he owns). In this case, he still could not legally divert any additional flows of water.

If, however, the downstream water user has not historically diverted his entire allotment because the amount of water he was entitled to divert was not available, then he may be entitled to divert additional (i.e., new) water flowing into the stream up to the amount of his original allotment.

Long-Term (and Permanent) Water Transfers

Like short-term transfers, a long-term water transfer involves changing the point of diversion, the place of use, or the intended purpose of the water. The only difference is that the period of change exceeds one year.¹⁵ A long-term transfer can include water that otherwise would have been consumptively used or stored, but it may also include return flows (for example, water applied to the land by a user, some of which returns to the drainage system and can be re-used by another user). As always, the transfer may not injure any legal user of water or unreasonably affect fish, wildlife, or other instream beneficial uses.

Long-term transfers, unlike short-term transfers, are subject to the requirements of CEQA. Depending on the circumstances, the documentation requirements can range from a simple declaration of “no significant environmental impact” to the development of a full environmental impact report. (See below for more information on CEQA and its requirements.)

In reviewing a proposed long-term transfer, the SWRCB must provide

public notice of the proposal and an opportunity for a hearing on it. This process can take months. If the parties involved cannot resolve valid protests to the proposed change through negotiations, then the SWRCB must hold a hearing prior to the approval or denial of the requested transfer. Protests are generally considered “valid” by the SWRCB if the protesting party can show that there is a possibility of injury to other water rights. The petitioner has to attempt to resolve the protests, and such attempts at resolution are often successful. The assistance of attorneys, engineers, and SWRCB staff can be invaluable during this phase.

FILING THE TRANSFER PETITION

Prior to filing for a short-, long-term, or permanent transfer, the parties to the transfer (i.e., the party selling the water and the party acquiring the water) must complete a background investigation into the validity of the water right that is the subject of the proposed transfer; the amount of water available for transfer; and any potential impact the transfer might have on other water users, the environment, or local communities. Subsequent chapters of this handbook detail the information needed to conduct this investigation, but meetings with SWRCB staff, other resource agency staff, attorneys, and engineers should be arranged early in the process to help ensure that all essential items are covered.

The SWRCB information requirements for transfer petitions are set forth in California Code of Regulations (CCR) Title 23, Section 794 (see Appendix H, “Requirements for Transfer Petitions”). This information applies to petitions for both short-term and long-term changes. On the petition form for a short-term transfer, the petitioner can indicate that the new purpose of the transferred water will be for the preservation or enhancement of wetlands habitat, fish and wildlife resources, or recreation in or on the water under Water Code section 1707. The petition form for long-term transfers does not contain a specific question regarding protection under Section 1707, but does allow the petitioner to specify the new purpose of use. (Copies of both petitions are attached in Appendix B, “State Water Resources Control Board Forms.”¹⁶)

The CCR requires that the petitioner assemble preliminary information and maps. The petitioner must provide this data to the California Department of Fish and Game (DFG) and the appropriate Regional Water Quality Control Board (RWQCB). The petitioner also must request a consultation with these agencies regarding the water project’s potential effects on water



quality, fish, and wildlife. The petitioner must provide any comments that the DFG and RWQCB make about the transfer proposal to the SWRCB.¹⁷

In addition to the Petition for Transfer form and the information required by the CCR, the petitioner must submit an Environmental Information form that highlights the potential environmental impacts of the transfer. (See Appendix B, "State Water Resources Control Board Forms."¹⁸)

CALIFORNIA ENVIRONMENTAL QUALITY ACT COMPLIANCE



Long-term transfers must be reviewed against the requirements of CEQA. This Act requires that a public agency determine and disclose whether a project will have any significant detrimental effects on the environment.¹⁹ CEQA applies to projects that are initiated by the state as well as projects initiated by private interests that require a permit, license, or written approval from any state or local administrative agency.

Long-term transfers must be reviewed against the requirements of CEQA, which require that a public agency determine and disclose whether a project will have any significant detrimental effects on the environment.

As such, the SWRCB must comply with CEQA in cases of long-term transfers. If the transfer requires the approval of another state or a local agency (such as an irrigation district), then that agency also must comply with CEQA. Although it is the agency's obligation to comply with CEQA, the applicant ordinarily pays the costs of compliance, such as expenses associated with the commissioning of necessary studies and the preparation of the environmental document.

Usually, the dedication of water for environmental restoration or enhancement falls under a categorical exemption in CEQA, since the project is, in fact, intended to benefit the environment.²⁰ However, if a project to enhance or restore one aspect of the environment has a potentially significant environmental impact elsewhere, then an exemption may not apply. As always, it is important to consult with the SWRCB staff early in the process so that they can guide you through the CEQA requirements or any other type of environmental review that may be required.



1. CAL. WATER CODE § 1707(a)(1) (Deering 2003).
2. *Id.* § 1707(a)(2).
3. *Id.* § 1707(b).
4. *Id.* §§ 1725, 1735.
5. *Id.* §§ 1725-1732.
6. *Id.* § 1729; CAL. PUB. RES. CODE §§ 21000 et seq. (Deering 2003).
7. CAL. WATER CODE § 1725.
8. *Id.* § 1726(e).
9. *Id.* § 1726(d).
10. *Id.* § 1727(b)(1).
11. *Id.* § 1726(f).
12. *Id.* § 1726(g)(1).
13. *Id.* § 1726(g)(2).
14. *Id.* § 1726(g)(3).
15. *Id.* § 1735.
16. The Petitions for Transfer forms can be downloaded at the SWRCB Web site at <http://www.waterrights.ca.gov/forms/>.
17. CAL. WATER CODE § 1726(c).
18. The Environmental Information form can be downloaded at <http://www.waterrights.ca.gov/forms/>.
19. For a more comprehensive discussion of CEQA compliance, see California Environmental Resources Evaluation System, Interactive CEQA Process Flow Chart (1998), at http://ceres.ca.gov/env_law/ceqa/flowchart/index.html.
20. CAL. CODE REGS. tit. 23, §§ 15307, 15308 (2003).